

THE HONORABLE JOHN H. CHUN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

AMAZON.COM, INC., a corporation,

Defendant.

CASE NO.: 2:23-cv-01495-JHC

**PLAINTIFFS' BRIEF
REGARDING NUMBER OF
DEPOSITIONS**

Pursuant to the Court's Order, Dkt. #151, Plaintiffs submit this brief in further support of the deposition limits Plaintiffs proposed in the Joint Status Report, Dkt. #135 ("JSR").

Plaintiffs allege that Amazon is engaged in a multi-faceted scheme of anticompetitive conduct that has foreclosed its rivals from gaining the scale needed to compete effectively against Amazon and harms both shoppers and sellers. Throughout this years-long course of conduct, Amazon has wielded its Buy Box, pricing algorithms, seller contracts, Prime eligibility, and proprietary fulfillment service for the same fixed purpose—to maintain its monopolies.

Courts may allow parties to take more than the default ten depositions per side, "taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, . . . the importance of the proposed discovery in resolving the issues," and the factors set out in Rule 26(b)(2)(c). *Thykkuttathil v. Keese*, 294

1 F.R.D. 601, 602 (W.D. Wash. 2013); *see* Fed. R. Civ. P. 26(b). Here, “[t]he breadth and
 2 complexity” of Amazon’s anticompetitive conduct, *Thykkuttathil*, 294 F.R.D. at 603, and the
 3 importance of this case to the public, justify Plaintiffs’ request to take up to 135 fact depositions
 4 of party witnesses and up to 90 fact depositions of non-party witnesses, or alternately up to 630
 5 deposition hours for party witnesses and 350 hours for non-party witnesses.

6 ARGUMENT

7 A. Party Depositions

8 Plaintiffs propose that each side be allowed to take up to 135 fact depositions of party
 9 witnesses, including former employees. Plaintiffs’ initial proposal of 630 hours was based in part
 10 on the expectation that many depositions would be narrowly focused, with many taking a half
 11 day or less. If the Court is inclined to set a cap based on the number of depositions, rather than
 12 hours, Plaintiffs’ current estimate is that approximately half of their time would be used for full-
 13 day depositions and the other half would be used for shorter depositions averaging a half day or
 14 less in length.

15 Courts have adopted similar discovery caps in other major antitrust enforcement actions,
 16 and this case is even broader in scope than those actions. *See, e.g., United States v. Google LLC*,
 17 No. 20-cv-03010 (D.D.C. Feb. 3, 2021), Dkt. #108-1 at 11 (80 fact depositions per side,
 18 including up to 16 14-hour depositions); *FTC v. Meta Platforms, Inc.*, No. 20-cv-03590 (D.D.C.
 19 Mar. 3, 2022), Dkt. #103 at 4 (840 hours per side); *FTC v. Qualcomm Inc.*, No. 17-cv-00220
 20 (N.D. Cal. Sept. 22, 2017), Dkt. #207 at 4 (no limit); *United States v. Blue Cross Blue Shield of*
 21 *Mich.*, No. 10-cv-14155, Dkt. #177 at 1 (E.D. Mich. May 29, 2012) (170 depositions per side);
 22 *In re Intel Corp. Microprocessor Antitrust Litig.*, No. 1:05-cv-485, Dkt. #1455 at 5 (D. Del. Apr.
 23 14, 2009) (1,297 hours for plaintiffs and 1,061 for defendant); *In re Microsoft Corp. Antitrust*
 24

1 *Litig.*, No. 1:05-cv-1087, Dkt. #51 at 3 (D. Md. Feb. 6, 2008) (500 hours per side).

2 Plaintiffs' proposal is driven by two key factors: the scope of Amazon's conduct at issue,
3 which is extensive, and the relevant timeframe, which stretches from the 2010s through the
4 present.

5 ***Scope of Amazon's Conduct.*** Amazon is engaged in an interrelated, exclusionary course
6 of conduct that stifles competition, keeps rivals from gaining the scale needed to compete
7 effectively against Amazon, and unlawfully maintains Amazon's monopolies in two markets.
8 That conduct spans multiple arms of Amazon's business, including its first-party Retail and
9 third-party Marketplace units, online superstore, advertising services, Prime subscription
10 program, and fulfillment services.

11 Plaintiffs challenge Amazon's anti-discounting tactics, which punish third-party sellers
12 that offer lower prices off-Amazon and discipline rivals from undercutting Amazon's prices.
13 (§§ 262-350.)¹ Plaintiffs intend to depose senior executives responsible for that overarching
14 strategy, and employees from multiple teams involved in this anti-discounting conduct, including
15 employees responsible for or involved with:

- 16 • Amazon's Competitive Monitoring Team, which maintains Amazon's massive
17 price surveillance system (§ 263);
- 18 • the development, implementation, and operation of the SC-FOD algorithm, which
19 disqualifies a seller's offer from winning the Buy Box if Amazon detects a price
20 that is lower for that product elsewhere (§§ 275-77);
- 21 • the various penalties Amazon uses to make it more difficult for shoppers to find
22 and purchase items that do not have a Buy Box, including employees involved in
23

24 ¹ Citations in the form (§ §) are to Plaintiffs' Complaint, Dkt. # 114.

1 search, advertising, and the design of Amazon’s online store (§§ 282-84);

- 2 • the design and enforcement of Amazon Standards for Brands and Customer
- 3 Experience Ambassadors, contractual mechanisms Amazon uses to ensure that
- 4 sellers do not offer lower prices or a different selection of products elsewhere (§§
- 5 291-304);
- 6 • the development, implementation, and operation of Amazon’s first-party anti-
- 7 discounting algorithm (§§ 325-37); and
- 8 • specific instances where Amazon has deployed its anti-discounting tactics against
- 9 rivals, including Walmart (§§ 334-37), Jet.com (§§ 340-42), and Zulily (§§ 343-
- 10 49).

11 Plaintiffs also allege that Amazon coerces sellers into using its fulfillment service,
 12 Fulfillment by Amazon (“FBA”), by conditioning Prime eligibility on the use of FBA (§§ 351-
 13 409). In addition to senior executives responsible for that strategy, Plaintiffs intend to depose
 14 employees from several relevant teams, including employees responsible for or involved with:

- 15 • Amazon’s strategic decision to force sellers to use FBA to obtain Prime eligibility
- 16 for their products (§§ 353, 361-63);
- 17 • Seller-Fulfilled Prime (“SFP”), a program that allowed sellers to use non-FBA
- 18 fulfillment solutions for Prime-eligible orders, which Amazon closed to new
- 19 enrollment in 2019 due to fears that it could help independent fulfillment
- 20 providers grow to scale and benefit other retailers (§§ 397-404);
- 21 • the Featured Merchant Algorithm, which determines which offer will win the Buy
- 22 Box and gives preference to Prime-eligible offers (§ 359); and
- 23 • Prime, the subscription program that underlies Amazon’s ability to successfully
- 24

1 coerce sellers (§§ 106-07, 358-60).

2 Plaintiffs' claims concerning Project Nessie, Amazon's scheme to induce other online
3 stores to raise their prices, will require Plaintiffs to depose employees involved in the
4 development and operation of Project Nessie (§§ 419-25) and witnesses involved in Amazon's
5 decisions to repeatedly turn it on and off (§§ 426-30).

6 Plaintiffs have pleaded two relevant markets monopolized by Amazon: an Online
7 Superstore Market and an Online Marketplace Services Market. Plaintiffs intend to depose
8 several groups of witnesses with information relevant to market definition beyond those
9 discussed above, such as employees responsible for analyzing competition and making
10 competitive assessments (*e.g.*, §§ 172-75) and employees familiar with financial data relevant to
11 market shares (§§ 168-71, 204-05). Plaintiffs also anticipate deposing employees involved in
12 search and advertising, areas where direct evidence shows that Amazon has monopoly power.
13 (§§ 228-48).

14 Plaintiffs intend to depose Amazon employees involved in tracking and analyzing the
15 impact of Amazon's conduct on competition, shoppers, and sellers. Those witnesses will include,
16 among others, Amazon's in-house economists (*e.g.*, § 235).²

17 Finally, Plaintiffs intend to depose Amazon witnesses regarding any procompetitive or
18 other cognizable justifications asserted by Amazon. Amazon has claimed that its conduct is
19 "facially procompetitive" (Dkt. #127 at 2) and will bear the burden of proof on that issue. *See*
20 *FTC v. Meta Platforms, Inc.*, 2023 WL 3092651, at *1 (D.D.C. Apr. 26, 2023). However,
21 Amazon has not identified any of the 18 Amazon employees named in its initial disclosures as
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23 ² *See also* Lydia DePillis, *Amazon gets an edge with its secret squad of PhD economists*, CNN
24 BUS. (Mar. 13, 2019), <https://www.cnn.com/2019/03/13/tech/amazon-economists/index.html>
(reporting that Amazon had hired more than 150 Ph.D. economists, "making it probably the
largest employer in the field behind institutions like the Federal Reserve").

1 having information regarding any such justifications. (Bolles Decl., Ex. A.) Plaintiffs cannot
 2 predict what specific justifications Amazon will eventually assert, or how many witnesses will
 3 need to be deposed as a result.

4 ***Relevant Timeframe.*** Amazon’s conduct at issue extends across over a decade, which
 5 means Plaintiffs will have to take additional depositions to account for employee turnover and
 6 movement within Amazon. For example, Amazon’s Business Solutions Agreement explicitly
 7 prohibited sellers from offering lower prices elsewhere from at least 2011 through 2019, when
 8 Amazon quietly stopped enforcing its price parity provisions in the face of government scrutiny
 9 and instead expanded SC-FOD to enforce its pricing “expectations and policies,” which “ha[d]
 10 not changed.” (¶¶ 272-276.) Amazon launched SFP in 2015 (¶ 398) and began developing
 11 Project Nessie in the early 2010s (¶ 419).

12 Amazon’s conduct is ongoing, and there have already been relevant changes since
 13 Plaintiffs filed the Complaint: for example, Amazon reopened SFP to new enrollment in October
 14 2023, shortly after this case was filed.³ Plaintiffs have reason to believe that Amazon will
 15 continue to make changes to its conduct throughout discovery in this case, all in the service of its
 16 exclusionary course of conduct. As Mr. Bezos has said, “on matters of vision we are stubborn
 17 and relentless,” but “[o]n the details, we at Amazon are always flexible.” (¶ 38.)

18 Plaintiffs respectfully submit that their proposed limits for fact depositions of Amazon
 19 employees and former employees—135 depositions per side, or alternatively, 630 deposition
 20 hours per side—are justified based on the needs of the case, the importance of the proposed
 21 discovery in resolving the issues, and the importance of the issues at stake in this litigation.

22
 23 ³ *New seller enrollment has reopened for Seller Fulfilled Prime*, AMAZON SELLER FORUMS,
 24 <https://sellercentral.amazon.com/seller-forums/discussions/t/ff5fcef8-c5d5-4035-b94f-c9922954912e> (last visited Feb. 16, 2024).

1 Amazon itself has described this as “an exceptional case in its scope and complexity,” JSR, Dkt.
2 #135 at 4, and as discussed above, the vast scope of Amazon’s conduct at issue will require
3 substantial discovery. Further, there can be no question that this case involves vitally important
4 issues, given that Amazon’s monopolistic conduct affects tens of millions of American
5 households, hundreds of thousands of sellers on Amazon, and hundreds of billions of dollars in
6 commerce every year.

7 **B. Non-Party Depositions**

8 Plaintiffs propose that each side be allowed to take up to 90 fact depositions of non-party
9 witnesses. As with Plaintiffs’ initial proposal for party depositions discussed above, Plaintiffs’
10 initial proposal of 350 hours for non-party depositions was based in part on the expectation that
11 most non-party depositions would be less than seven hours, and that many would take a half day
12 or less. Plaintiffs believe this proposal strikes a reasonable balance between the needs of this case
13 and the potential burden and expense of discovery for non-parties. In contrast, Amazon proposes
14 no limit on non-party depositions—an approach Plaintiffs are concerned will result in an undue
15 burden for non-parties and Plaintiffs.

16 This case will involve discovery from several categories of non-parties. Plaintiffs
17 anticipate deposing several categories of third-party sellers relevant to Plaintiffs’ allegations,
18 including sellers impacted by Amazon’s ever-increasing take rate, which is the percentage cut
19 Amazon takes out of sellers’ revenues (¶¶ 252-54); sellers subject to Amazon’s anti-discounting
20 conduct, like the sellers Amazon punishes when it finds lower prices off-Amazon (¶¶ 272-285);
21 sellers subject to Amazon Standards for Brands and Customer Experience Ambassadors (¶¶ 286-
22 304); and sellers who Amazon has coerced into using FBA (¶¶ 361-74).

23 Plaintiffs also anticipate taking depositions of actual and potential competitors in both
24

1 relevant markets, as well as depositions of companies Amazon identifies as competitors (¶¶ 170-
 2 75, 204-05); out-of-market businesses that Amazon may contend should be included in a relevant
 3 market, such as brick-and-mortar stores and Software-as-a-Service providers (¶¶ 140-47, 198-
 4 200); and independent fulfillment providers (¶ 386-89). Amazon has identified several of the
 5 same or similar groups of relevant non-parties in its initial disclosures (although it has not
 6 identified any non-parties by name). (Bolles Decl., Ex. A.)

7 Amazon has also identified three additional categories of non-parties: “third-party service
 8 providers, such as e-commerce service providers, social media channels, [and] search engines”;
 9 wholesale suppliers and vendors; and “third-party customer benefit program providers.” (Bolles
 10 Decl., Ex. A.) However, these categories do not justify Amazon’s proposal for unlimited non-
 11 party depositions.⁴ A limit of 90 non-party depositions per side will allow both sides to
 12 adequately develop non-party evidence while still giving the parties guidance as to how many
 13 non-party depositions they may need to prepare for. A limit will also require both sides to use
 14 depositions judiciously, which will limit the overall burden of discovery on non-parties.

15 CONCLUSION

16 Plaintiffs respectfully request that the Court adopt Plaintiffs’ proposal for limits on
 17 depositions.

18
 19
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 21
 22 ⁴ Amazon’s proposal is difficult to reconcile with its approach to non-party discovery in the
 23 California Action. At the parties’ February 8 Scheduling Conference, Amazon’s counsel
 24 indicated that it was “in the middle of that [non-party discovery] in California.” Scheduling
 Conf. Tr. at 16:20-23. However, as of the last Joint Case Management Statement in the
 California Action, filed on January 18, “Amazon ha[d] not identified or noticed the depositions
 of any third parties beyond those noticed by [California].” (Bolles Decl., Ex. B).

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I certify that this brief contains 2098 words, in compliance with Dkt. #151.

Respectfully submitted,

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